

United States  
Circuit Court of Appeals  
For the Ninth Circuit *f*

---

BARNARD-CURTISS COMPANY,  
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

---

Reply Brief of Appellant

---

Howard Toole  
W. T. Boone  
Attorneys for Appellant.

---

Upon Appeal from The District Court of The United  
States for The District of Montana.

---

---

Filed .....

FILED  
JUN 23 1940

..... Clerk

PALIL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

BARNARD-CURTISS COMPANY,  
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

---

Reply Brief of Appellant

---

Howard Toole  
W. T. Boone  
Attorneys for Appellant.

---

Upon Appeal from The District Court of The United  
States for The District of Montana.



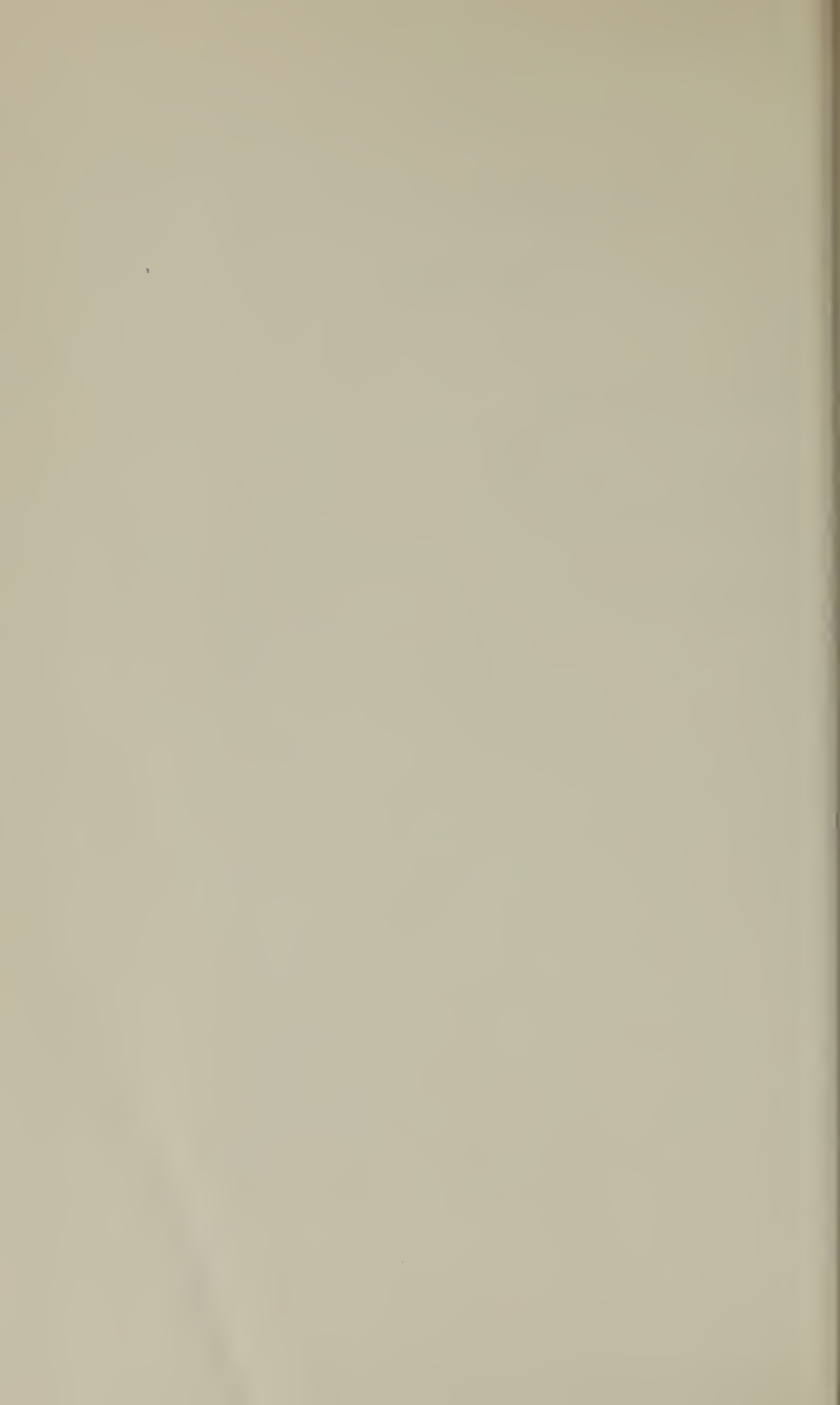
## INDEX

	Page
Reference to Specification of Errors .....	1

## CITATIONS

### Cases:

Berry vs. Earling, 82 Fed. (2d) 317 .....	3
Gelberg vs. Richardson, 82 Fed. (2d) 314 .....	3
Gripton vs. Richardson, 82 Fed. (2d) 313 .....	3



REFERENCE TO  
SPECIFICATION OF ERRORS

Appellee opens his brief with a discussion of the question as to whether or not Appellant included a proper specification of errors in its brief. It is urged that the specification contained in Appellant's brief is not sufficient and that the Court may disregard the brief on that account.

There has been some uncertainty in connection with specification of errors since the adoption of the new rules for the district courts. The procedure in the district court appears to be a statement of points to be relied upon rather than a specification of error. It might be better practice for counsel to repeat those points in the brief, and certainly counsel does not wish to have his brief disregarded for failing to do so. The form used by Appellant in this case was in conformity with the brief in *United States of America vs. Paul W. Harris, Trustee in Bankruptcy*, 100 Fed. (2d) 268 wherein the Appellant specified or assigned errors in exactly the same manner as used in the case at bar. We call the Court's attention to the briefs in that case.

To avoid any question in this connection the Appellant specifies errors in the case at bar as follows:

I.

The court erred in denying the motion of the defendant (R. 374) for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the action because his joinder was essential in order

to prevent the defendant being exposed to double or multiple liability and because he was a proper party to the action as shown by the motion and as born out by the evidence.

## II.

The court erred in denying defendant's motion for a directed verdict on plaintiff's first cause of action in that there was not sufficient proof of the making of a contract to justify submission of said cause of action to a jury and for the further reason that even if said contract had been made the same was made with Maehl and Metcalf jointly and not singly and there is therefore a fatal variance between the proof and the pleadings, and for the further reason that even if such contract was made, and even if no such variance did exist, the plaintiff failed to prove by any evidence that such contract was executed and carried out by him (R. 353).

## III.

The court erred in denying defendant's motion for a directed verdict on plaintiff's second cause of action in that there was not sufficient proof of the making of a contract to justify submission of said cause of action to a jury and for the further reason that even if said contract had been made the same was made with Maehl and Metcalf jointly and not singly and there is therefore a fatal variance between the proof and the pleadings, and for the further reason that even if such contract was made, and even if no such variance did exist, the plaintiff failed to prove by any evidence that



such contract was executed and carried out by him (R. 354).

IV.

The court erred in denying defendant's motion for a directed verdict on plaintiff's sixth cause of action upon the ground and for the reason that there was no proof whatsoever to sustain any claim under said cause of action (R. 354).

V.

The court erred in overruling defendant's objection to the form of the verdict for the reason that if the cause was to go to a jury said jury should have returned separate verdicts on each separate cause of action (R. 359).

VI.

The court erred in denying defendant's motion to direct a general verdict for the defendant and against the plaintiff for the amount of \$3320.09 on the ground and for the reason that the proof shows conclusively that even if all of the contracts mentioned in the complaint were made and even if all the services pleaded were rendered plaintiff owes an unpaid balance to the defendant (R. 355).

In support of his suggestion that the Court ought to disregard the entire specification of errors in Appellant's brief the Appellee cites *Gripton vs. Richardson*, (C.C.A. 9) 82 Fed. (2) 313; *Gelberg vs. Richardson*, (C.C.A. 9) 82 Fed. (2d) 314; *Berry vs. Earling*, (C.C.A. 9) 82 Fed. (2d) 317.

— 1 —

In those cases there was no specification of errors whatsoever and those cases were decided prior to the enactment of the new rules. There is a specification, though abbreviated, in the case at bar.

It is not the intention of Appellant to waive any of the errors specified above and it is thought that substantial justice will be accomplished if consideration is given to the errors specified.

The argument in Appellant's brief is broken down into four main sub-divisions which proceed in orderly form with the discussion of each of the questions involved in the action. It was not thought by Appellant that the argument was susceptible of being summarized and it was not thought that any rights would be waived on account of the abbreviated summary of the argument.

Respectfully submitted.

*Howard Goble*  
.....  
*W. J. Boone*  
.....

Attorneys for Appellant.

Service on the foregoing Reply Brief and receipt of three copies thereof accepted this ..... day of ....., 1940.

.....  
.....  
.....

Attorneys for Appellee.